

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUBEN ODELL BOULWARE, No. C 09-02792 CW (PR)
Plaintiff, ORDER OF SERVICE
v.
D. M. DUNSTAN,
Defendant.

INTRODUCTION

Plaintiff Ruben Odell Boulware, a state prisoner currently incarcerated at California Men's Colony State Prison, filed this pro se civil rights action under 42 U.S.C. § 1983. He alleges that Defendant CTF Correctional Officer D. M. Dunstan retaliated against him for filing inmate grievances while incarcerated at the Correctional Training Facility (CTF) in Soledad, California.

Plaintiff's motion for leave to proceed in forma pauperis has been granted.

Venue is proper in this district because the acts complained of occurred at CTF, located in Monterey County, which is within this judicial district. 28 U.S.C. §§ 84(a), 1391(b).

Plaintiff raised the same retaliation claim against Defendant Dunstan in a previous action before this Court. See Case no. 06-2733 CW (PR). On December 18, 2007, Plaintiff's retaliation claim in Case no. 06-2733 CW (PR) was dismissed without prejudice to re-filing it in a new action because he "did not exhaust his administrative remedies with respect to his retaliation claim in a timely manner." (Dec. 18, 2007 Order in Case no. 06-2733 CW (PR) at 9.) Plaintiff now claims that he has since exhausted his administrative remedies with respect to his retaliation claim.

1 Therefore, he has re-filed his retaliation claim against Defendant
2 Dunstan in the present action.

3 DISCUSSION

4 I. Standard of Review

5 A federal court must conduct a preliminary screening in any
6 case in which a prisoner seeks redress from a governmental entity
7 or officer or employee of a governmental entity. 28 U.S.C.
8 § 1915A(a). In its review, the court must identify any cognizable
9 claims and dismiss any claims that are frivolous, malicious, fail
10 to state a claim upon which relief may be granted or seek monetary
11 relief from a defendant who is immune from such relief. Id.
12 § 1915A(b)(1), (2). Pro se pleadings must be liberally construed.
13 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
14 1988).

15 To state a claim under 42 U.S.C. § 1983, a plaintiff must
16 allege two essential elements: (1) that a right secured by the
17 Constitution or laws of the United States was violated, and
18 (2) that the alleged violation was committed by a person acting
19 under the color of state law. West v. Atkins, 487 U.S. 42, 48
20 (1988).

21 II. Retaliation Claim

22 Plaintiff alleges several acts of retaliation by Defendant
23 Dunstan, including: instructing prison staff not to provide
24 Plaintiff with "clean clothing" in August, 2005; intimidating
25 Plaintiff on September 7, 2005; authoring fabricated rule violation
26 reports against Plaintiff on November 7, 2005, November 28, 2005,
27 and January 18, 2006; and conducting harassing searches of
28 Plaintiff's cell and seizures of his property on November 29, 2005.

(Compl. at 5-9.) Prisoners may not be retaliated against for exercising their right of access to the courts, Schroeder v. McDonald, 55 F.3d 454, 461 (9th Cir. 1995), which extends to established prison grievance procedures, Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995). Plaintiff alleges that Defendant Dunstan's actions were in retaliation against Plaintiff for filing grievances. The Court finds that, liberally construed, Plaintiff's claim for retaliation for filing grievances is cognizable. See Schroeder, 55 F.3d at 461; Bradley, 64 F.3d at 1279.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Plaintiff presents a constitutionally cognizable retaliation claim against Defendant Dunstan.

2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint and all attachments thereto (docket no. 1) and a copy of this Order to CTF Correctional Officer D. M. Dunstan. The Clerk of the Court shall also mail a copy of the complaint and a copy of this Order to the State Attorney General's Office in San Francisco. Additionally, the Clerk shall mail a copy of this Order to Plaintiff.

3. Defendant is cautioned that Rule 4 of the Federal Rules of Civil Procedure requires Defendant to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant to Rule 4, if Defendant, after being notified of this action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fails to do so, Defendant will be required to bear the cost of such service unless good cause be shown for

1 their failure to sign and return the waiver form. If service is
2 waived, this action will proceed as if Defendant had been served on
3 the date that the waiver is filed, except that pursuant to Rule
4 12(a)(1)(B), Defendant will not be required to serve and file an
5 answer before sixty (60) days from the date on which the request
6 for waiver was sent. (This allows a longer time to respond than
7 would be required if formal service of summons is necessary.)

8 Defendant is asked to read the statement set forth at the foot of
9 the waiver form that more completely describes the duties of the
10 parties with regard to waiver of service of the summons. If
11 service is waived after the date provided in the Notice but before
12 Defendant has been personally served, the Answer shall be due sixty
13 (60) days from the date on which the request for waiver was sent or
14 twenty (20) days from the date the waiver form is filed, whichever
15 is later.

16 4. Defendant shall answer the complaint in accordance with
17 the Federal Rules of Civil Procedure. The following briefing
18 schedule shall govern dispositive motions in this action:

19 a. No later than ninety (90) days from the date
20 Defendant's answer is due, Defendant shall file a motion for
21 summary judgment or other dispositive motion. The motion shall be
22 supported by adequate factual documentation and shall conform in
23 all respects to Federal Rule of Civil Procedure 56. If Defendant
24 is of the opinion that this case cannot be resolved by summary
25 judgment, Defendant shall so inform the Court prior to the date the
26 summary judgment motion is due. All papers filed with the Court
27 shall be promptly served on Plaintiff.

28 b. Plaintiff's opposition to the dispositive motion

1 shall be filed with the Court and served on Defendant no later than
2 sixty (60) days after the date on which Defendant's motion is
3 filed. The Ninth Circuit has held that the following notice should
4 be given to pro se plaintiffs facing a summary judgment motion:

5 The defendant has made a motion for summary
6 judgment by which they seek to have your case dismissed.
7 A motion for summary judgment under Rule 56 of the
Federal Rules of Civil Procedure will, if granted, end
your case.

8 Rule 56 tells you what you must do in order to
9 oppose a motion for summary judgment. Generally, summary
10 judgment must be granted when there is no genuine issue
11 of material fact -- that is, if there is no real dispute
12 about any fact that would affect the result of your case,
13 the party who asked for summary judgment is entitled to
14 judgment as a matter of law, which will end your case.
15 When a party you are suing makes a motion for summary
16 judgment that is properly supported by declarations (or
17 other sworn testimony), you cannot simply rely on what
18 your complaint says. Instead, you must set out specific
facts in declarations, depositions, answers to
interrogatories, or authenticated documents, as provided
in Rule 56(e), that contradict the facts shown in the
defendant's declarations and documents and show that
there is a genuine issue of material fact for trial. If
you do not submit your own evidence in opposition,
summary judgment, if appropriate, may be entered against
you. If summary judgment is granted [in favor of the
defendants], your case will be dismissed and there will
be no trial.

19 See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en
20 banc).

21 Plaintiff is advised to read Rule 56 of the Federal Rules of
22 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)
23 (party opposing summary judgment must come forward with evidence
24 showing triable issues of material fact on every essential element
25 of his claim). Plaintiff is cautioned that because he bears the
26 burden of proving his allegations in this case, he must be prepared
27 to produce evidence in support of those allegations when he files
28 his opposition to Defendant's dispositive motion. Such evidence

1 may include sworn declarations from himself and other witnesses to
2 the incident, and copies of documents authenticated by sworn
3 declaration. Plaintiff will not be able to avoid summary judgment
4 simply by repeating the allegations of his complaint.

5 c. If Defendant wishes to file a reply brief, Defendant
6 shall do so no later than thirty (30) days after the date
7 Plaintiff's opposition is filed.

8 d. The motion shall be deemed submitted as of the date
9 the reply brief is due. No hearing will be held on the motion
10 unless the Court so orders at a later date.

11 5. Discovery may be taken in this action in accordance with
12 the Federal Rules of Civil Procedure. Leave of the Court pursuant
13 to Rule 30(a)(2) is hereby granted to Defendants to depose
14 Plaintiff and any other necessary witnesses confined in prison.

15 6. All communications by Plaintiff with the Court must be
16 served on Defendant, or Defendant's counsel once counsel has been
17 designated, by mailing a true copy of the document to Defendant or
18 Defendant's counsel.

19 7. It is Plaintiff's responsibility to prosecute this case.
20 Plaintiff must keep the Court informed of any change of address and
21 must comply with the Court's orders in a timely fashion.

22 8. Extensions of time are not favored, though reasonable
23 extensions will be granted. Any motion for an extension of time
24 must be filed no later than fifteen (15) days prior to the deadline
25 sought to be extended.

26 IT IS SO ORDERED.

27 DATED: 5/7/2010



CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

RUBEN ODELL BOULWARE,

Case Number: CV09-02792 CW

Plaintiff,

CERTIFICATE OF SERVICE

v.

D M DUNSTAN et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 7, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Ruben Odell Boulware V16965
California Men's Colony State Prison
Cell #5239X
P.O. Box 8101
San Luis Obispo, CA 93960

Dated: May 7, 2010

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk

United States District Court
For the Northern District of California